new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period."

Title 21, U.S. Code, §174:

"§174. Same; Penalty; evidence

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Title 26, U.S. Code, §4704(a):

"§4704. Packages

(a) General requirement.—It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence

of appropriate tax paid stamps from narcotic drugs shall be *prima facie* evidence of a violation of this subsection by the person in whose possession the same may be found."

V.

STATEMENT

The petitioner, Jack Lewis Cousins, was charged by indictment filed September 9, 1968 in the District Court of the United States for the Western District of Washington, Northern Division, in Cause No. 51496. A jury returned a verdict on January 28, 1969 finding the defendant guilty of both counts of the indictment. Count One charged the petitioner with knowingly selling and facilitating the sale of a narcotic drug (Heroin Hydrochloride), knowing the same to have been imported into the United States contrary to law, all in violation of Title 21, U.S. Code, §174. Count Two of the indictment charged a violation of Title 26, U.S. Code, §4704(a) consisting of the sale or distribution of the same drug, not in the original stamped package and not from the original stamped package (Tr. 1, 2).

After the verdict of guilty was returned and on April 16, 1969 petitioner moved for a new trial on the grounds of newly discovered evidence (Tr. 29). This motion was denied and on May 16, 1969 judgment and sentence was entered.

The petitioner was given the mandatory minimum sentence of five years on each of the counts with the sentences to run concurrently.

Special Agent J. H. Park of the Federal Bureau of Narcotics and Dangerous Drugs testified that on September 8, 1968 at about 8:30 p.m. he went to the Seattle Apartments

at 9th and Pike Streets in Seattle, Washington with one Joe Hayes (Tr. 7, 16). Joe Hayes had been acting as an informer assisting Special Agent Park in making arrests (Tr. 17). Joe Hayes had been arrested in the previous year in California and charged with possession of narcotics. This charge was left pending. Joe Hayes was then referred to Seattle to assist the Seattle Police Department and the Federal Narcotics people in making arrests in the Seattle area (Tr. 17).

Special Agent Park stated that Informant Hayes had arranged for him to go to the Seattle Hotel that evening. They went to petitioner Cousins' room. Petitioner Cousins was expecting Hayes to be alone (Tr. 16). Special Agent Park then testified that petitioner Cousins with some reluctance allowed Special Agent Park and Informant Hayes into his room.

While at the apartment, Special Agent Park received from petitioner Cousins "two spoons" of heroin (Tr. 8). Special Agent Park also testified that the heroin was placed in a cellophane wrapper from a cigarette package and that this wrapper was furnished by Special Agent Park (Tr. 8, 10, 11). Special Agent Park stated that the cellophane he furnished petitioner did not have any tax stamps on it (Tr. 11). He stated that the petitioner had the heroin in another cellophane package but no testimony was offered concerning the existence or non-existence of tax stamps on that container (Tr. 8, 24, 26, 27).[1]

1. Should this court grant certiorari and a new trial result petitioner would ask that this court direct a judgment of acquittal on Count Two and that petitioner should be re-tried on Count One only. At the close of the government's case in chief, appellant moved to dismiss Count Two of the indictment on the ground that the government had presented no evidence of any kind that the package from which the appellant was alleged to have dispensed the heroin and in which he kept the heroin

Petitioner admitted the possession of the heroin and asserted that he was entrapped. Petitioner was at the time of trial 53 years of age (R. 59). He had never been convicted of a crime and had been arrested but once on a mistaken charge of non-support (R. 100). His background included working for the Alaska railroad from age 17 for approximately seven years (R. 60), employment with the Civil Aeronautics Authority (R. 61), construction work in Alaska for the Army and Navy (R. 60-62), three and one-half years service in the United States Navy, and thereafter work as a civilian employee of the Army and extensively as a merchant marine mariner (R. 62-64).

At the time of trial, petitioner was the owner-operator of a tavern on Pike Street in Seattle and had been engaged in that business for three and a quarter years (R. 65). Special Agent Park and the petitioner gave similar testimony that anyone working in the Pike Street area would have occasion to acquire some knowledge about narcotics and those people who use or sold narcotics (R. 139).

Petitioner testified that to his knowledge he had only seen heroin twice in his life and he was not sure about those times as he could not identify it (R. 85, 100). Petitioner testified that he was not involved in the drug traffic. He then detailed the only two times that he had ever had

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was not the original stamped package. The only testimony relating to such stamps or their absence was that the cellophane cigarette package covering furnished by the agent of the government did not have any such stamps on it (R. 8, 10, 11, 24, 26 and 27). An indictment charging a violation of Title 26, U.S. Code, §4704 (a) is fatally defective unless it affirmatively alleges that the narcotic drugs were not in the original stamped package and not from the original stamped package. U.S. v. Bailey, 272 F.2d 360 (CA 7, 1960). It necessarily follows that these allegations are essential elements of the offense and must be proved by some competent evidence. In this case, however, the government failed completely to offer any evidence in this regard and, therefore, failed to prove an essential element of the offense.

anything to do with drugs. The last occasion was some two months prior to the incident for which petitioner was charged. A friend of his called him and told him that he had just been released from the hospital. The friend indicated that he was in significant pain and could not get in touch with his doctor to get a prescription. The friend wanted to know if there was anything petitioner could do to get ahold of something to relieve his pain. The petitioner told him no and that he knew of no way he could get anything to relieve the friend's pain. Two or three hours later the petitioner was walking up the street from his tavern to his apartment and one John Trambites asked petitioner if he knew of anyone who would want to buy heroin. Petitioner stated that he did not (R. 102). Petitioner then remembered his friend's call and the pain that his friend was in. He then called his friend and asked his friend if he wanted any heroin. The friend did, and petitioner Cousins went to where the friend was, got money from the friend and took the money to John Trambites. John Trambites then gave the money to Joe Hayes who then gave the heroin to Trambites who gave it to petitioner Cousins who delivered it to his friend (R. 101-103). Prior to that time, petitioner Cousins had not met Joe Hayes. Petitioner Cousins made no money on the transaction and simply acted as *a procuring agent* and *not a seller*.[2]

Petitioner Cousins then testified as to his second contact with drugs which gave rise to the charges in the indictment against him. He stated that at about 8:30 in the morning on

[2] See *Adams v. U.S.*, 220 F.2d 297 (CA 5, 1955), where the Court of Appeals directed a verdict of acquittal when a person was charged with being a seller of narcotics under circumstances similar to those described in the body of this petition.

September 8, 1968, Joe Hayes came to his apartment, knocked on the door, and got him out of bed. He let Hayes into the apartment whereupon Informant Hayes asked petitioner Cousins to lend him $5.00 for gasoline (R. 66-68). Hayes told petitioner that Hayes had been fishing at Seiku and that while there he spent $160.00. Hayes said his wife would kill him if he came home broke. Hayes told petitioner Cousins that he knew a fellow in a suburb of Seattle that was "sick" and needed something, heroin, or anything. Hayes told petitioner that if petitioner could get the heroin for him for $60 a spoon that Hayes could sell it for $75 a spoon. Hayes told petitioner that Hayes wanted to sell seven spoons so that Hayes could get $105.00 profit, pay petitioner Cousins back the $5.00 loan and still have $100.00 for his family and wife. Petitioner Cousins did not agree to obtain the heroin (R. 79).

Hayes then went on and on about the trouble he was in with his wife and how he needed grocery money for himself and his wife. Hayes continued to implore petitioner to obtain seven spoons of heroin for him. Petitioner Cousins finally agreed to try to obtain seven spoons of the drug from the friend who had purchased the narcotics from Hayes some two months earlier if the friend still had any of it left (R. 80, 98, 99). Hayes then advised Cousins that he would return about 8:30 in the evening to get the heroin if petitioner Cousins had been able to obtain the same.

Petitioner Cousins was able to get seven spoons of heroin from the friend who had previously acquired this same drug from Hayes with Cousins acting as an intermediary (R. 98, 99). At about 8:30 p.m. Hayes returned to Cous-

ins' apartment with Special Agent Park. Hayes identified Park as the man who wanted the stuff. Hayes told petitioner Cousins that Park wouldn't trust him with the money and that was the reason that he was brought along. Hayes also indicated that all Park wanted was two spoons. If the heroin was good they would come back and get the remaining five spoons (R. 81-83). Petitioner Cousins then gave Special Agent Park two spoons and Park gave petitioner Cousins $150.00. Petitioner Cousins went into the kitchen and gave Hayes $15 a spoon less the $5 Cousins had loaned to Hayes. As Cousins did not have quite the right change, he gave Hayes but $23 with the remaining $2 to be paid to Hayes when he got change (R. 86). The balance of the money which figured out at $60 a spoon was the amount of money per spoon which Cousins in turn had to turn over to his friend—the person from whom the heroin was obtained. Petitioner Cousins made no money on the transaction. In fact, the original understanding with Informant Hayes was that petitioner Cousins was not to make any money on the arrangement but was merely to give Hayes an opportunity to acquire some money for himself and his family (R. 81).

Informant Hayes was subpoenaed by the United States but called as a witness by petitioner Cousins. Informant Hayes confirmed that he had been arrested in California in the previous year on a narcotics charge which was left pending while he came to Seattle to act as an informant in the Seattle area. Hayes acknowledged that he was acting on behalf of the United States government when he contacted petitioner Cousins on September 8, 1968 (R. 58). While Informant Hayes was available to the government, the government did not call Hayes as a witness to dispute

in any way the testimony given by petitioner Cousins as to what had transpired prior to the time that Special Agent Park arrived at petitioner Cousins' apartment at 8:30 p.m. on September 8, 1968. Thus, petitioner Cousins' evidence in this respect was uncontradicted.

The government recalled Special Agent Park whose testimony was designed to show that petitioner Cousins was already in the business of supplying narcotic drugs. The government hoped to prove that petitioner Cousins was ready and willing to commit the offense with which he was charged and not entrapped into the commission of that offense.

Special Agent Park testified on rebuttal that one John Trambites had made two separate cocaine sales to Special Agent Park. He further testified that petitioner Cousins told Special Agent Park on the evening of September 8, 1968 that petitioner Cousins had sold Trambites cocaine. Petitioner Cousins, according to Park, also advised Special Agent Park that Cousins had a Portland connection for buying cocaine and that the price ought to be better on it a little later. Special Agent Park also testified that petitioner Cousins talked to him about manufacturing dangerous drugs; that Cousins had connections out of the state that could rob a store to obtain raw material for amphetamines; and that petitioner Cousins tested heroin by shooting it in his hip (R. 125-128). Special Agent Park indicated that he wanted to leave the jury with the impression that petitioner Cousins was "a rather big dealer in narcotics" and made "a lot of money at it" (R. 130). All of this testimony of Special Agent Park conflicted with that of petitioner Cousins, who steadfastly maintained that his

only contact with drugs were the incidents already described and that no such conversation had taken place.

The trial court instructed the jury on entrapment, stressing that one is entrapped when one has "no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officers or their agents to commit a crime. . . ." The court pointed out that on the other hand

> "where a person already has the readiness and willingness to break the law, the mere fact that a government agent provides what appears to be a favorable opportunity is not entrapment."[3]

3. The full instruction was as follows:

"Now, as you recall from argument of counsel, the offense here, this defendant asserts that he was the victim of entrapment as to the crime charged in the indictment.

"Now, where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officers or their agents to commit a crime, he is the victim of entrapment.

"Now, as you recall from argument of counsel, the offense here, this defendant asserts that he was the victim of entrapment as to the crime charged in the indictment.

"Now, where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officers or their agents to commit a crime, he is the victim of entrapment.

"The law, as a matter of policy, forbids conviction in such a case, even though he might otherwise be convicted.

"On the other hand, where a person already has the readiness and willingness to break the law, the mere fact that a government agent provides what appear to be a favorable opportunity is not entrapment.

"For example, when the government suspects a person is engaged in the illicit trade of narcotics, it is not entrapment for a government agent to pretend he is someone else and to offer both directly or through an informer or other employee to purchase narcotics from such a suspected person.

"If then the jury should find beyond a reasonable doubt from all the evidence in the case that anything at all occurred respecting the alleged offenses involved in this case that the defendant was ready and willing to commit a crime such as charged in the indictment and that the opportunity was afforded and that government officers or their agents did no more than offer the opportunity, then the jury would find that the defendant was not a victim of entrapment.

"If, on the other hand, the evidence in the case would leave the

At the time of trial, John Trambites and petitioner Cousins were under indictment for conspiracy to sell cocaine to Agent Park. Petitioner Cousins' trial counsel had talked with the former attorney for Mr. Cousins who had been informed that any attempt to get John Trambites to testify would not be fruitful while the criminal charge was pending against Trambites (R. 218). After the trial of petitioner Cousins, John Trambites plead guilty to other substantive counts in the indictment against him and the government dismissed the conspiracy count against petitioner Cousins.

Thereafter on April 16, 1969, petitioner Cousins moved for a new trial on the grounds of newly discovered evidence. The defendant's motion stated that the defendant had newly discovered evidence which was not available to him during or before the trial. This evidence was the testimony of John Trambites to the effect that petitioner Cousins was not the supplier of cocaine to Trambites (Tr. 29). An affidavit from John Trambites was submitted in support of the Motion for New Trial, which affidavit stated that Trambites knew petitioner Cousins and "that said Jack Lewis Cousins has never sold, supplied or furnished cocaine or any other drug to . . ." petitioner Cousins (Tr. 32).

At the argument on the motion, petitioner Cousins' counsel indicated that Trambites would have taken the Fifth Amendment had he been called to testify at Cousins' trial. As Trambites had plead guilty after the completion

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jury with a reasonable doubt whether the defendant had the previous intent or purpose to commit an offense of the character here charged and did so only because he was induced or persuaded by some officer or agent, undercover agent, of the government, then the jury should acquit him."

of Cousins' trial the Fifth Amendment was no longer available to him and he could and would now testify at any retrial. Petitioner's counsel also indicated that Mr. Trambites had named his supplier of drugs to his pre-sentence investigator and that this information was in the pre-sentence report in the Trambites case (R. 220, 221). The government did not deny the truth of the allegations submitted in support of the Motion for New Trial, and the court in ruling on the motion assumed that they were true (R. 221, 222).

The court denied the Motion for New Trial, which denial was affirmed by the Ninth Circuit Court of Appeals.

VI.

REASONS FOR GRANTING THE WRIT

Question A: Denial of Trial by Jury

This petition raises an important question of Federal constitutional law which has not been, but should be, settled by this court. The Sixth Amendment to the Constitution of the United States provides in part as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."

This right to a trial by jury in criminal cases has been held by this court to be so "fundamental to the American scheme of justice" as to be included within the Fourteenth Amendment due process guarantees *Duncan v. Louisiana*, 391 U.S. 145, 149, 88 S. Ct. 1444, 20 L.ed.2d 491 (1968), reh. den. 392 U.S. 947, 88 S. Ct. 2270, 20 L.ed.2d 1412. This court pointed out that:

> ". . . the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the

exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence. The deep commitment of the nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the due process clause of the Fourteenth Amendment, and must therefore be respected by the States."

* * *

". . . the most recent and exhaustive study of the jury in criminal cases concluded that juries do understand the evidence and come to sound conclusions in most of the cases presented to them and that when juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed." (p. 156)

The Sixth Amendment requirement for a jury trial is not satisfied by the mere fact that the defendant's guilt was determined by a jury at a trial. The guilt or innocence of the accused must be *fairly determined*. Thus, in *Turner v. Louisiana*, 379 U.S. 466, 85 S. Ct. 546, 13 L.ed.2d 424 (1965), this court held that the right to a fair jury trial was denied the accused when the principal witnesses against him were law enforcement officers who were sequestered with the jury. By the same token, an accused can be denied the right to a constitutionally guaranteed fair jury trial because of prejudicial comments of the trial judge. It is no answer under these circumstances for a judge (appellate or court of first instance) to determine independently that there was adequate evidence to convict. As this court stated in *Bollenbach v. U.S.*, 326 U.S.

607, 614, 615, 66 S. Ct. 402, 90 L.ed. 350 (1946):

> ". . . in view of the government's insistence that there is abundant evidence to indicate that Bollenbach was implicated in a criminal enterprise from the beginning, it may not be amiss to remind that *the question is not whether guilt may be spelt out of a record*, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the Federal courts."

In each of the categories of situations mentioned, the accused who is granted a new trial is granted a new jury trial with all of the safeguards established for an initial prosecution whether or not a judge may believe that the accused is guilty. The question of guilt or innocence is not determined by the trial judge or the reviewing court, but is left to a determination by a jury in accordance with the constitutional standards embodied in the Sixth or Fourteenth Amendment to the Constitution of the United States. This principle that a jury determines guilt or innocence was not followed by the Ninth Circuit Court of Appeals in reviewing petitioner Cousins' Motion for a New Trial. The court used a test for passing on a Motion for New Trial on the grounds of newly discovered evidence which, in essence, required the petitioner to prove to a judge his innocence in order to obtain a new trial. That unconstitutional test was that the accused must show that "in all likelihood" the new evidence would "change the outcome of the trial" and that an "acquittal would be likely to result." (Appendix A, pp. A-2, 3)

This test is so commonly used in other Circuits that *Wright, Federal Practice and Procedure*, unequivocally indicates that a motion based on newly discovered evidence must disclose "that it will probably produce an

acquittal" (Vol. 2, §557, p. 515). *U.S. v. Costello*, 255 F.2d 876 (CA 2, 1958) cert. denied, 78 S. Ct. 1385, 357 U.S. 937, 2 L.ed.2d 1551; *Johnson v. U.S.*, 32 F.2d 127 (CA 8, 1929). Only rarely has a Circuit Court recognized that this test contains implicit constitutional problems about whether the judge or a jury is to determine the guilt or innocence of an accused. See the dictum in *Cleary v. U.S.*, 163 F.2d 748, 749 (CA 9, 1947), which was thereafter distinguished in *Mejia v. U.S.*, 291 F.2d 198 (CA 9, 1961) and not followed in the case presently before this court and other cases from the Ninth Circuit. *Wolcher v. U.S.*, 233 F.2d 748 (CA 9, 1956), cert. denied 77 S. Ct. 61, 352 U.S. 839, 1 L.ed.2d 56, and *Brandon v. U.S.*, 190 F.2d 175 (CA 9, 1951).

The decision in petitioner Cousins' case by the Ninth Circuit Court of Appeals is contrary to the test this court has enunciated for determining the materiality of newly discovered evidence. In *Griffin v. U.S.*, 336 U.S. 704, 709, 69 S. Ct. 814, 816, 93 L.ed. 993 (1949), Justice Frankfurter, speaking for the court, held that newly discovered evidence was sufficiently material because it would be

> "'. . . too dogmatic, on the basis of mere speculation, for any court to conclude that the jury would not have attached significance to the evidence favorable to the defendant had the evidence been before it."

In other words, an accused is entitled to have a jury weigh the newly discovered evidence unless a court concludes dogmatically that a jury would not have attached significance to the evidence favorable to the defendant had the evidence been before it. See also, *Mesarosh v. U.S.*, 352 U.S. 1, 77 S. Ct. 1, 1 L.ed.2d 1 (1956), where this court held that an accused was entitled to a new trial when

the government advised the court that one of its witnesses had testified falsely on several occasions in *subsequent* prosecutions. In that case the Opinion of the Court stated (at p. 12):

> ". . . In a criminal case, the original finder of fact was a jury. The district judge is not the proper agency to determine that there was sufficient evidence at the trial, other than that given by Mazzei [the witness who testified falsely in subsequent prosecutions], to sustain a conviction of any of the petitioners. Only the jury can determine what it would do on a different body of evidence, and the jury can no longer act in this case. For this reason . . . if on a remand the district court should rule that the verdict against some of the petitioners could stand, we would be obliged, on a subsequent appeal, to reverse and, at that late date, direct that a new trial be granted."

While the Opinion of the Court did point out that the *Mesarosh* case, *supra*, was not dealing with a motion for a new trial initiated by the defense under Rule 33, there does not seem to be any reason based in logic or experience which would support one kind of rule if the government brought the newly discovered evidence to the court and a different kind of rule if the defendant brought the same newly discovered evidence to the court. The fundamental fairness or unfairness of the trial would in each instance be the same.

In the case at bar, the testimony of John Trambites was certainly material to petitioner Cousins' only defense—entrapment. That testimony of John Trambites would have established that petitioner Cousins had not supplied any drugs to Trambites nor been involved in any way with him in the drug traffic. The only significant evidence that Cousins was ready and willing to commit the offense

charged was Special Agent Park's testimony which attempted to link Cousins with Trambites in the drug traffic. While petitioner Cousins was unable to convince a judge that this newly discovered evidence would be likely to produce an acquittal, it certainly would be dogmatic to say that a jury could not under the facts of the case regard that newly discovered evidence as sufficient to raise a reasonable doubt as to the guilt of the accused petitioner Jack Lewis Cousins.[4]

Petitioner respectfully submits that the test employed in weighing the newly discovered evidence substitutes the determination of a judge for that of a jury on matters of fact in violation of the *Sixth Amendment to the Constitution of the United States*. A motion for a new trial based on newly discovered evidence will be granted only if (1) the evidence is material and newly discovered and (2) the failure to learn of that evidence was due to no lack of diligence on the part of the defendant. If the accused must also prove to a judge that the evidence would probably produce an acquittal, the accused is being denied the right to have his guilt or innocence determined by a jury on all of the material evidence because of the fortuitous and non-culpable event that it was discovered after the time his

4. New trial granted because of newly discovered evidence that government witnesses were led to believe that cases pending against them would be treated favorably if their trial testimony was consistent with the government's view of the facts *Hawkins v. U.S.*, 324 F.2d 873 (CA 5, 1963). After trial discovery of a newspaper article consistent with defendant's testimony at the time of trial held sufficient to require a new trial on the grounds of newly discovered evidence as there was no way of knowing in advance of trial as to the key role the newspaper article might play. *Dyleski v. U.S.*, 262 F.2d 710 (1958). New trial granted on the grounds of newly discovered evidence that principal witness against accused had been hypnotized for interrogation purposes during investigation leading to trial. *U.S. v. Miller*, 411 F.2d 825 (CA 2, 1969).

trial was concluded rather than before that time. This, petitioner respectfully submits, denies to petitioner the right to a jury trial guaranteed to him by the *Sixth Amendment to the Constitution of the United States*.

Question B: Test of Materiality of Newly Discovered Evidence Under Federal Rules of Criminal Procedure, Rule 33

The decision of the Ninth Circuit Court of Appeals is contrary to the decisions of this court and represents such a departure from proper procedure as to call for an exercise of this court's power of supervision. The proper interpretation of *Rule* 33 and its provisions relating to motions for new trial on the grounds of newly discovered evidence is extremely important to this petitioner and to the general administration of justice in the Federal courts at large.

Petitioner has discussed the proper test to be applied in determining the materiality of newly discovered evidence under Question A, *supra*. The contention is there raised that the test used by the Ninth Circuit Court of Appeals and by many other Circuits that one must prove to a judge that the newly discovered evidence would be likely to produce an acquittal is an unconstitutional test. It is here submitted that if that test is not unconstitutional, it is certainly an improper test to use in cases arising under *Rule* 33 of the *Federal Rules of Criminal Procedure* and is contrary to the decisions of this court in *Griffin v. U.S.*, 336 U.S. 704, 69 S. Ct. 814, 93 L.ed. 993 (1949) and *Mesarosh v. U.S.*, 352 U.S. 1, 77 S. Ct. 1, 1 L.ed.2d 1 (1956). The material presented under Question A is ap-

Petitioner Cousins respectfully urges that the test of the *Griffin* case, *supra*, should be the test employed in deciding cases under *Rule* 33. The accused should not be required to convince a judge that the newly discovered evidence is likely to acquit. The burden on the accused should be only to show that the newly discovered evidence is of sufficient weight that a reasonable jury might consider the evidence material to the jury's determination of the guilt or innocence of the accused. Petitioner further respectfully submits that the newly discovered evidence brought to the attention of the trial court and of the Ninth Circuit Court of Appeals in his case is of a type that a reasonable jury might consider that evidence material to its determination of his guilt or innocence and that petitioner should be granted a new trial before a jury.

VII.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

JOEL A. C. RINDAL
MALCOLM L. EDWARDS
Counsel for Petitioner

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JACK LEWIS COUSINS,
Defendant-Appellant.

No. 24,547

Appeal from the United States District Court
for the Western District of Washington
Northern Division

Before: DUNIWAY, WRIGHT and TRASK, Circuit Judges.

WRIGHT Circuit Judge:

Appellant Cousins was convicted of possession of illegally imported heroin in violation of 21 U.S.C. §174, and of selling heroin not in or from the original stamped package in violation of 26 U.S.C. §4704(a). The sale in question was made to Special Agent Jay H. Park of the Federal Bureau of Narcotics and Dangerous Drugs. Apart from a chemist who identified the substance sold as heroin, Agent Park was the only witness against Cousins.

The latter took the stand, and defended on the ground of entrapment. To rebut the defense, the Government recalled Agent Park, who testified that Cousins had admitted being the principal supplier of cocaine to one John Trambitas. The point of the agent's testimony was that Cousins' previous dealings showed that he was "ready and willing" to commit the crime charged. *Sherman v. United States*, 356 U.S. 369 (1958).

At the time of both trials, Trambitas was under indictment for conspiracy together with Cousins to sell cocaine to Agent Park.[1] Not unreasonably assuming that he would plead the privilege against self-incrimination rather than testify to his dealings with Cousins, appellant's counsel did not call Trambitas as a witness.[2] After the verdicts, Trambitas pleaded guilty to another count in the indictment against him, and the Government dismissed the count in which Cousins was involved.

Judgment not yet having been entered on the verdicts, Cousins moved for a new trial on the ground of newly-discovered evidence. His motion was supported by affidavits that Trambitas was willing to testify, and that his testimony would be to the effect that he had never purchased cocaine from Cousins, Agent Park's testimony to the contrary notwithstanding. The district court denied the motion for a new trial, and this appeal was taken.

The test for the grant of a new trial under these circumstances is whether the newly discovered evidence would probably lead to an acquittal on retrial. In considering the matter, it is important to bear in mind that the scope of our review is limited to determining whether the trial judge abused his discretion in determining that no acquittal would be likely to result. *Fernandez v. United States*, 329 F.2d 899 (9th Cir. 1964); *Balestreri v. United States*, 224 F.2d 915 (9th Cir. 1955).

1. This information does not appear in the record before us, but we take notice, as we may, *Lowe v. McDonald*, 221 F.2d 228 (9th Cir. 1955), of judicial records in the custody of the clerk of the United States District Court for the Western District of Washington, Northern Division. *See United States v. Trambitas*, No. 51,501 (W.D. Wash., filed Sept. 9, 1968).

2. Because of the disposition we make of this case, we do not determine whether the actions of counsel herein constituted "due diligence."

In the case before us, the jury did not have to rely on Agent Park's testimony alone to find that Cousins was "ready and willing" to commit the crime. Cousins himself admitted on the stand a prior sale of heroin, very similar to the one charged. He confessed familiarity with a number of men who the jury could have found were involved in narcotics traffic. By his own testimony, he was able to obtain within a few hours seven "spoons" of heroin to be sold to Agent Park, yet he was extremely evasive as to what his previous dealings with these sources had been.

Reading the cold record, we do not believe Cousins' story that he was entrapped. The experienced judge below, who had the additional advantages of observing the witnesses' testimony, specifically found that the proferred testimony would not have been of sufficient weight "to in all likelihood change the outcome of the trial." No doubt he thought that the contradiction of one part of the agent's testimony by an admitted trafficker in narcotics would have mattered little to the jury, as against the evasiveness and implausibility of appellant's defense. We cannot say there was an abuse of discretion.

We are foreclosed from considering appellant Cousins' contention, based on *Leary v. United States*, 395 U.S. 6 (1969), that the presumption of knowledge of illegal importation of heroin contained in section 174 violates due process. *Turner v. United States*, 396 U.S. 398 (1970). Since the conviction under section 174 is valid, and concurrent sentences were imposed, we need not consider the validity of his conviction on the other count. *Hirabayashi v. United States*, 320 U.S. 81, 105 (1943).

Affirmed.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JACK LEWIS COUSINS,
Defendant-Appellant.

No. 24,547
ORDER

Before: DUNIWAY, WRIGHT and TRASK, Circuit Judges.

The Petition for Rehearing is denied.

DATED: July 21, 1970.

s/s EUGENE A. WRIGHT
Circuit Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Ninth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

JACK LEWIS COUSINS,
Defendant-Appellant.

No. 24547

FILED
Jul. 31, 1970
Wm. B. Luck, Clerk

ORDER STAYING ISSUANCE OF MANDATE

Upon application of JOEL A. C. RINDAL, counsel for the Appellant, and good cause appearing, IT IS ORDERED that the issuance, under Rule 41 (a) of the Federal Rules of Appellate Procedure, of the certified copy of the judgment of this Court in the above cause be and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the Appellant herein, provided such petition is filed in the Clerk's Office of the Supreme Court of the United States on or before August 21, 1970.

In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

s/s EUGENE A. WRIGHT
United States Circuit Judge.

DATED: SAN FRANCISCO, CALIF.
JULY 29, 1970

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No. 572

Supreme Court, U.S.
FILED
SEP 23 1970
E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1970

JACK LEWIS COUSINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 572

JACK LEWIS COUSINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Western District of Washington, petitioner was convicted on a two-count indictment charging him with possession of illegally imported heroin in violation of 21 U.S.C. 174, and of selling heroin not in or from the original stamped package in violation of 26 U.S.C. 4704(a). On May 16, 1969, he was sentenced to concurrent terms of five years' imprisonment on each count. The court of appeals affirmed (Pet. App. A). On July 21, 1970, a petition

for rehearing was denied (Pet. App. B). The petition for a writ of certiorari was filed on August 21, 1970, and is therefore out of time under Rule 22(2) of the Rules of this Court.

The evidence disclosed that, on September 8, 1968, Jay Park, an agent for the Federal Bureau of Narcotics and Dangerous Drugs, and Joe Hayes, an informer, went to petitioner's apartment. Posing as a peddler, Park agreed to purchase ten spoons of heroin from petitioner. Petitioner measured out two spoons, as a sample, and gave it to Park. Park paid him $150 for the heroin and arranged to purchase the rest the next day. He then left (Tr. 6-12, 16, 30).[1]

Petitioner admitted selling the heroin to Park (Tr. 82-85). He testified, however, that the transaction had been planned by Hayes, who told petitioner he needed money badly (Tr. 65-80). Petitioner had agreed as a favor to Hayes. He obtained the narcotic from a friend, "Harry," to whom he had previously supplied heroin (Tr. 88-89).

Park testified that he told petitioner that he had previously bought cocaine from a John Trambitas and was under the impression that petitioner was Trambitas' supplier. Petitioner admitted this was true (121-122). Park said he would be interested in buying cocaine directly from petitioner, who stated that it might be possible in about two weeks (Tr. 125-126).

After the trial was concluded but before sentence, petitioner presented a motion for a new trial based

[1] "Tr." refers to the trial transcript, a copy of which we are lodging with the clerk of this Court.

on alleged newly discovered evidence of Trambitas. Trambitas had been under indictment, together with petitioner, for sale of cocaine to Park. According to petitioner, Trambitas was unavailable as a witness at the trial since he would have asserted his privilege against self-incrimination. Trambitas had since pleaded guilty. Petitioner furnished an affidavit from Trambitas that he would be willing to testify that petitioner had never supplied him with cocaine (Tr. 202-203; Pet. App. A-2). After a colloquy, the motion was denied. The court found that there was a lack of diligence in endeavoring to secure Trambitas' testimony and that his testimony was not of sufficient materiality as to "in all likelihood change the outcome of the trial" (Tr. 219).

Petitioner's motion on its face was insufficient to warrant a new trial. There is nothing beyond petitioner's assertion to indicate that Trambitas would have claimed his Fifth Amendment privilege if called as a witness at trial. Counsel for petitioner admitted that he made no effort to bring Trambitas into court (Tr. 218). Moreover, he sought no continuance of the trial on the basis of a need for Trambitas' evidence. Petitioner thus wholly failed to show that the evidence was unavailable to him in the exercise of reasonable diligence.

In addition, the asserted new evidence was of only tangential pertinence. Park's statement that petitioner told him he was Trambitas' supplier was admitted as proof of petitioner's willingness to deal in narcotics. Whether petitioner's admission to Park was true was not relevant to this issue. At best,

Trambitas' testimony would merely have had the effect of casting doubt on Park's evidence that petitioner made the admission. As the court below found, other evidence revealed petitioner's familiarity with narcotics and the ease with which he was able to conclude the sale to Park. Petitioner admitted having sold heroin in the past. Thus, even without the evidence that petitioner was a supplier in an unrelated transaction, the jury could readily have concluded that he was predisposed to commit the offenses charged. Under these circumstances, the denial of petitioner's motion was not an abuse of discretion. *United States* v. *Craft*, 421 F.2d 693 (C.A. 9); *United States* v. *Gleeson*, 411 F.2d 1091 (C.A. 10); *United States* v. *Costello*, 255 F.2d 876 (C.A. 2), certiorari denied, 357 U.S. 937.

Petitioner further argues that the decision of the trial judge that the newly discovered evidence would not "in all likelihood" have produced an acquittal constituted a usurpation of the jury's function. Clearly, however, as petitioner recognizes, some standard of materiality must be applied to claims of newly discovered evidence, else "any subsequently discovered inaccuracy in the testimony of an important trial witness, which might have affected his credibility in the eyes of the jury, would entitle a convicted defendant to a new trial"—a proposition rejected by this Court. *Shotwell Mfg. Co.* v. *United States*, 371 U.S. 341, 357. The standard followed by the courts below is in accordance with uniform holdings under Fed.

R. Crim. P. 33,[2] and constitutes a reasonable balance between assuring that the Rule be used as a means of correcting "substantial [in] justice" and preventing its abuse to overturn guilty verdicts obtained as a result of a fair trial. See *United States* v. *Johnson*, 327 U.S. 106, 112-113.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1970.

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[2] See, *e.g.*, *United States* v. *Curtis*, *United States* v. *Gleeson*, and *United States* v. *Costello*, *supra*.

[3] In *Griffin* v. *United States*, 336 U.S. 704, relied on by petitioner, the question of the proper standard for determining relevance of the alleged newly discovered evidence was not decided by the Court. The question in that case was whether the asserted new evidence (that the deceased victim carried a knife) was admissible—*i.e.*, whether it constituted legal "evidence." The dictum as to the standard of relevance, *id.* at 709, has not been followed by the lower courts. Nor would it be "too dogmatic" here to conclude that the jury would "not have attached significance to the evidence favorable to the defendant had the evidence been before it." *Ibid.*

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